Filed 6/19/09 P. v. Walden CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. WILLIE JAMES WALDEN, Defendant and Appellant.	B207808 (Los Angeles County Super. Ct. No. BA292486)

APPEAL from a judgment of the Superior Court of Los Angeles County, Teri Schwartz, Judge. Affirmed.

Rita L. Swenor, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, James William Bilderback II, Supervising Deputy Attorney General, and David Zarmi, Deputy Attorney General, for Plaintiff and Respondent.

Willie Walden appeals from the judgment entered upon his negotiated plea of no contest to transportation of cocaine base, which followed denial of his motion to suppress evidence. Defendant was sentenced to state prison for four years, to run concurrently with a three-year sentence in an unrelated case. He contends that his suppression motion was improperly denied. We affirm.

BACKGROUND

Evidence adduced at the preliminary hearing established that on the evening of September 14, 2007, officers received information that defendant was hiding narcotics in his buttocks. A warrantless strip search yielded a cellophane bindle containing 4.77 grams of cocaine base. Defendant was bound over for trial and filed a motion to suppress evidence of the cocaine.

At the hearing on defendant's motion, Glendale Police Officer Sean Riley testified that on the date in question he and his partner, Rafael Quintero, observed defendant driving a van in which a passenger was not wearing a seat belt. The officers ran a records check and determined that the driver license of the registered owner, who matched defendant's description, had been suspended. The officers stopped the van. Defendant told them that he was driving on a suspended license and was on probation. In the course of conducting further investigation, Riley was told that a warrant was outstanding for one of defendant's passengers, that the passenger did not want to go to jail, and that the passenger had said defendant was holding drugs "[b]etween his buttocks."

Defendant was arrested for driving with a suspended license. A pat-down search of defendant and a search of the van did not reveal any contraband. Defendant was handcuffed behind his back, placed in the back seat of the officers' patrol car, and strapped in with a shoulder seatbelt. While defendant was there, Officer Quintero observed defendant pushing himself up with his hands, moving back and forth and from side to side. When the door to the patrol car was opened about a minute later, defendant's seatbelt was unbuckled and his "pants were down past his buttocks. They were like halfway down like he was trying to take them off." The patrol car was searched but nothing was found.

Defendant was then taken to a hotel in which he had been staying, where he consented to a search of his room. Again, nothing was found. The next stop was the police station.

At the police station, Officer Riley filled out a Penal Code section 4030 form, seeking permission to perform a visual body cavity search of defendant. Riley presented the form to his supervisor, who signed it. (Through oversight, a check-off box indicating that a reasonable suspicion existed for the search was not marked. Riley testified at the suppression motion hearing that he believed he had reasonable suspicion for the search.)

Once the form was completed, defendant was taken into a holding cell by Officer Quintero and a jail supervisor. Defendant refused to be searched and other officers were called for assistance. Officers Quintero and Riley, the jail supervisor, and another officer again advised defendant that he was to be searched. Defendant refused to cooperate, cursing and screaming at the officers. One officer pulled defendant's pants down to defendant's ankles while two other officers held defendant's still-handcuffed wrists. Defendant's buttocks were compressed "like you're flexing a muscle." After about two minutes, defendant "decided to release his grasp on his buttocks." Quintero then removed the cellophane bindle from defendant's buttocks.

The method of retrieval was further described as follows: "I guess the best way to explain it, if you were opening a book" "[t]hat was very old and didn't want to be opened and he's trying to pull the book apart, he had to pull the book apart until at one point he could see the cellophane and then it fell out as he was grabbing, as it was coming out. It was between his butt cheeks." Quintero did not "have to put his hand inside [defendant's] rectal cavity to get the bindle."

Defendant did not present any evidence at the hearing. In denying defendant's motion, the trial court noted that the information from defendant's passenger that defendant had narcotics in his buttocks and defendant's movements in the back of the patrol car "are two separate things that can form the basis for reasonable suspicion." The court continued that "whether or not [defendant] was going to be placed in general population, really doesn't become a question at that point. The question remains, which

is typical question in these cases, did they have the reasonable suspicion to conduct the search? And I think that under these circumstances that they did and I don't think anything they did violated [Penal Code section] 4030. Certainly not in a way that it would disturb their ability to do the search."

DISCUSSION

Penal Code section 4030, subdivisions (d)(3) and (h), require that a warrant be secured before performing a "physical body cavity search" on a person arrested for a misdemeanor or an infraction. The warrant requires "reasonable suspicion based on specific and articulable facts to believe such person is concealing a weapon or contraband . . . ." (*Id.*, subd. (f).) Defendant contends that such a search, which "means physical intrusion into a body cavity for the purpose of discovering any object concealed in the body cavity" (*id.*, subd. (d)(3)), occurred here.

Regardless of whether the conduct of the officers here constituted an intrusion into a body cavity, as opposed to a "visual inspection of a body cavity" (Pen. Code, § 4030, subd. (d)(2)), for which no warrant is necessary, suppression of evidence is required only if it is the product of a search conducted without probable cause under the United States Constitution. (See *People v. McKay* (2002) 27 Cal.4th 601, 609–610; *People v. Wade* (1989) 208 Cal.App.3d 304, 307–308.) Such cause existed in this case.

In *People v. Wade*, *supra*, 208 Cal.App.3d 304, a defendant who appeared to be under the influence of narcotics during a traffic stop for an expired registration was taken to the police station where he was asked to pull down his trousers and spread his buttocks. An officer saw a plastic object protruding from the defendant's anus. Another officer, wearing rubber gloves, spread the defendant's buttocks, causing the bindle to fall to the floor. (*Id*. at pp. 306–307.)

After noting that Penal Code section 4030 was not the basis for an exclusionary rule, the *Wade* court continued: "Use of the federal exclusionary rule has been discussed in scores of cases involving physical searches. For example, in *Rochin* v. *California* (1952) 342 U.S. 165 [72 S.Ct. 205], the Supreme Court emphasized the importance of a case-by-case balancing test to determine whether an invasion into a suspect's body

'shocks the conscience' [citation] or involves 'methods too close to the rack and the screw to' be tolerated. [Citation.] There, officers forcibly entered the defendant's bedroom, jumped on him in an unsuccessful effort to force expectoration of morphine capsules he swallowed, and finally retrieved the contraband by having his stomach pumped at a hospital. The court determined this episode offended 'even hardened sensibilities' and suppressed the evidence. [Citation.] In *Winston* v. *Lee* (1985) 470 U.S. 753 [], the court concluded a proposed surgery under general anesthesia to remove a bullet from the defendant's chest without his consent would not be tolerated. The decision set forth various factors which should be considered, including 'the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity' and 'the community's interest in fairly and accurately determining guilt or innocence.' [Citation.] [¶] This case [*Wade*] pales by comparison with *Rochin* and *Winston*: The body search was brief, nonviolent, minimally intrusive, and not conducted in a grossly offensive manner." (*People v. Wade*, *supra*, 208 Cal.App.3d at pp. 308–309.)

Similarly, there was nothing about the search conducted here that was grossly offensive or would otherwise shock the conscience. Based on the applicable standard of appellate review, deferring to the trial court's factual findings and exercising our independent judgment on the question of reasonableness (*People v. Maury* (2003) 30 Cal.4th 342, 384), we conclude that defendant's motion to suppress was properly denied.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

FERNS, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.